

**LETTER OPINION
2003-L-09**

February 13, 2003

Mr. Garryle B. Stewart
Fargo City Attorney
PO Box 1897
Fargo, ND 58107-1897

Dear Mr. Stewart:

You ask whether a transaction concerning special assessments involving the Fargo Park District (Park District), the City of Fargo (City) and the Red River Zoological Society, Inc., a non-profit corporation (Zoo) would be a violation of N.D. Const. art. X, § 18. I am advised that the Park District has leased land it owns to the Zoo for use as a zoo. The long term lease is for a nominal base rent but requires the Zoo to pay all special assessments against the leased property as additional rent. Because of development around the property leased by the Zoo, special assessments have been substantial and are likely to be so in the future. I understand the Zoo is in default under the lease for failure to pay installments of special assessments paid by the Park District in the sum of \$22,000.¹ The Park District has also prepaid installments of special assessments due in the future in the sum of \$138,000 which were refinanced by Park District bonds.

The Park District is considering forgiveness of the total amount of special assessments due under the current lease in the sum of \$160,000 at the request of the Zoo. I am advised the Park District is contemplating entering into a new lease which will not require payment by the Zoo of special assessments in the future. The City for its part has created a tax increment financing (TIF) district to pay the additional special assessments made in 2001 and thereafter according to a TIF Plan. See N.D.C.C. §§ 40-58-20, 40-58-20.1. The TIF district covers a section of land on which the 100-acre zoo is located. I further understand that proceeds from the district will be used only to pay special assessments for

¹ Political subdivisions such as the Park District are not exempt from payment of special assessments of a city. N.D.C.C. § 40-23-07. They are to be paid from taxes. Id. See also N.D.C.C. § 40-23.1-06 (same regarding alternative assessment basis). Thus, the Park District is liable under law for the special assessments but shifted responsibility for payment to the Zoo through the long-term lease.

infrastructure costs (streets, sewer, water, etc.) and not be used to pay for operation of the Zoo.

The City and the Park District are concerned this transaction may be considered a donation prohibited by N.D. Const. art. X, § 18.² See N.D.A.G. 2002-F-09. In that opinion, I concluded that a donation by the Burleigh County Commission for a 4th of July celebration was an illegal donation under N.D. Const. art. X, § 18 because the county did not have the statutory authority to make the donation. Id. The opinion did not address whether a county with home rule authority could make such a donation. Id. at fn.1.

The use of public funds is restricted by Article X, section 18 of the North Dakota Constitution, which provides:

The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article XX of the constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor

The North Dakota Supreme Court has determined Article X, section 18 does not prohibit a state or political subdivision from loaning or giving its credit or making donations in connection with the state or political subdivisions' operation of any authorized industry, enterprise, or business. Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237-38 (N.D. 1964). Rather, what it does prohibit is for the state or political subdivision to "otherwise" loan or give its credit or make donations. Id.

In this case, both the City and the Park District would be assisting and supporting the operation of the zoo by the proposed three-party transaction in question. Fargo is a home rule city.

This office addressed a similar issue in N.D.A.G. 98-F-30. In that opinion, the Attorney General concluded that the city of Minot, a home rule city, could constitutionally donate money to the Young Men's Christian Association (YMCA), a private entity, if the donation was made in connection with an enterprise authorized by the city's home rule charter and an implementing ordinance sufficiently detailed to ensure the donation had a public purpose and the public purpose was met. Id.

² There is a distinction between a donation and an exchange for value, which does not violate N.D. Const. art. X, § 18. Adams County Record v. Greater North Dakota Association, 529 N.W.2d 830, 835 (N.D. 1995).

Under the authority given to home rule cities, N.D.C.C. ch. 40-05.1, cities may enact ordinances in matters of local concern that fall within the powers enumerated in N.D.C.C. § 40-05.1-06 if such powers are included in the city's home rule charter. N.D.A.G. 98-F-30, 93-F-11. A city's charter may authorize it to "engage in any utility, business, or enterprise permitted by the constitution or not prohibited by statute." N.D.C.C. § 40-05.1-06(10). In addition, "[i]f a home rule city wants to engage in an enterprise not authorized by statute, it must have such an authorization in its charter and the proposed enterprise must be implemented through an ordinance. N.D.C.C. §§ 40-05.1-06, 40-05.1-06(10)." N.D.A.G. 98-F-30 (quoting N.D.A.G. 93-F-11). In N.D.A.G. 98-F-30 the Attorney General said:

The home rule charter for the city of Minot authorizes the city to "engage in any utility or enterprise permitted by the constitution or not prohibited by statute" Home Rule Charter, City of Minot, Art. 3, sec. j (1972). No statute prohibits a home rule city from creating an enterprise through which the city could provide funds for the use of a private organization. Thus, it is necessary to determine whether a city's provision of funds for the use of a private organization such as the YMCA constitutes an enterprise. See [N.D.A.G. 93-F-11].

"[T]he term 'enterprise' means any activity which does not violate the North Dakota Constitution or statutes and which is of some scope, complication, or risk." Id. . . . Participating in a program to provide funds for the use of a private organization such as the YMCA is of some scope, complication, or risk and, therefore, would constitute a permissible enterprise if done appropriately.

Two examples of types of possible enterprises Minot could create for providing the type of support it proposes for the Minot YMCA are as follows. First, Minot could establish an enterprise to provide a physical fitness program for its citizens. Minot, through its enterprise, could contract with a third party, such as the YMCA, for the provision of services under that program.

A second example of an enterprise Minot could create would involve developing a grant program to provide funds to organizations for promoting the health and welfare of Minot's citizens. The grant program would necessarily need specific application criteria. If an applicant, such as the YMCA, met those criteria, the city could provide funding for the applicant's provision of services promoting the citizens' health and welfare. Minot's establishment of either type of these programs may be a permissible enterprise.

In its attempt to create a permissible enterprise, Minot should realize there are several restrictions on an enterprise's purpose and structure. This office has previously explained that "[a] city may not engage in an enterprise unless it is for a public purpose." Id. Furthermore, "[a]n ordinance permitting a home rule city to engage in a particular enterprise must provide for supervisory controls to ensure that the public purpose is met." Id. The implementing ordinance must also "be sufficiently detailed so that the public is properly informed of the authority and limits of the enterprise." Id.

Thus, it is my opinion that a home rule city whose home rule charter authorizes it to enter into enterprises may engage in an enterprise whereby the city participates in a program to provide funds for the use of a private organization, such as the YMCA, if the implementing ordinance: "(1) authorizes the city to engage in the proposed enterprise, (2) provides assurance that the activity has a public purpose, (3) sufficiently details the manner of implementing the activity, and (4) provides for supervisory controls to ensure the public purpose is met." See Id.

Fargo, as a home rule city, may pass ordinances providing for the public welfare, N.D.C.C. § 40-05.1-06(7); may engage in any enterprise permitted by the constitution, N.D.C.C. § 40-05.1-06(10); may exercise powers of a corporation, N.D.C.C. § 40-05.1-06(13); and may contract with another government entity with respect to any project. N.D.C.C. § 40-05.1-06(15); Home Rule Charter City of Fargo, North Dakota, art. 3(G), (J), (M), (O).

As explained in N.D.A.G. 98-F-30, Fargo could create an enterprise involving development of a grant program to provide funds to organizations for promoting a public purpose. "A public purpose or business has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity and contentment of all the inhabitants or residents within a given political subdivision." Gripentrog v. City of Wahpeton, 126 N.W.2d 230 at 237 (N.D. 1964) quoting Green v. Frasier, 176 N.W. 11 (N.D. 1920) affirmed 253 U.S. 233 (1920). Although each case is dependent upon its own unique facts and circumstances, courts will generally defer to a legislative determination that a particular expenditure will promote the public welfare. Green v. Frasier, 253 U.S. 233 (1920); N.D.A.G. 98-F-30; N.D.A.G. 93-L-313.

A park district, established by a city, under N.D.C.C. ch. 40-49, may acquire and hold real and personal property for public recreational purposes. N.D.C.C. § 40-49-04. Operating a zoo provides a recreational benefit to the public. See, e.g., Best Products Co., Inc. v. Spaeth, 461 N.W.2d 91, 98 (N.D. 1990) (businesses listed in Sunday closing law that further rest and recreation construed to include parks and zoos); The American Heritage Dictionary 1407 (2d coll. ed. 1991) (zoo defined as "public park or institution" for keeping

and exhibiting animals). A strong argument exists that contributing funds to a zoo constitutes a public purpose.

Therefore, it is my opinion that Fargo may enter into the proposed transaction if it does so in connection with an enterprise authorized by the city's home rule charter and an implementing ordinance sufficiently detailed to ensure the donation has a public purpose and the public purpose is met.

The Park District is also a party to the proposed transaction. The Park District does not have statutory authority to make a donation to the Zoo, nor does it have home rule authority whereby it could enact an ordinance similar to Fargo creating an enterprise through which it could make donations to the Zoo. The Park District, does, however, have the authority to enter into a joint powers agreement with Fargo to exercise any power either one of them has. N.D.C.C. § 54-40.3-01(1). The joint powers agreement may address, among other things, "[t]he manner in which the parties to the agreement will finance the cooperative or joint undertaking" N.D.C.C. § 54-40.3-01(1)(d). "The parties . . . may expend funds . . . and otherwise share or contribute property in accordance with the agreement" Id. Thus, if Fargo creates an enterprise by which it makes a donation to or supports the Zoo, the Park District may enter into a joint powers agreement with Fargo to cooperate by making a donation to or supporting the Zoo.

Based on the foregoing, it is my opinion that forgiveness of the Zoo debt by the Park District for special assessments under its lease and funding by the City of the special assessments of the Park District under tax increment financing is not a donation in violation of the state constitution if an ordinance is passed by the City creating an enterprise allowing the proposed transaction and the Park District and the City enter into a joint powers agreement under N.D.C.C. ch. 54-40.3 for that purpose.

Sincerely,

Wayne Stenehjem
Attorney General

tam

cc: Timothy Q. Davies, Attorney At Law